Supreme Court, U.S.
FILED
SEP 13 1985
JOSEPH F. SPANIOL, JR.
CLERK

NO. 84-1554

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ALLYN R. SIELAFF, Director
Virginia Department of Corrections,

Petitioner,

V.

CLIFFORD W. CARRIER,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Fourth Circuit

BRIEF OF AMICI CURIAE, THE LEGAL FOUNDATION OF AMERICA, JOINED BY NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC., INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., AND AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., URGING REVERSAL

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INTEREST OF AMICI CURIAE

The National District Attorneys Association, Inc. ("NDAA") is a nonprofit corporation and the sole national organization representing state and local prosecuting attorneys in America. Since its founding in 1950, NDAA's programs of education, training, publication, and amicus curiae activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all of our citizens.

The Legal Foundation of America ("LFA") is a nonprofit corporation supporting the operations of a public interest law firm as that term is defined in IRS regulations. Among other

goals, it seeks to preserve a rational criminal justice system, in which adjudications of guilt or innocence are reliable rather than haphazard. LFA is located on the campus of, and shares certain personnel and activities with, the South Texas College of Law in Houston. In support of its goals, the Foundation's attorneys have frequently appeared to represent it as amicus curiae in this Court, as well as in the lower courts.

Americans for Effective Law Enforcement, Inc. ("AELE") is a national not-for-profit citizens' organization interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their lives, liberties and property, within the framework of the various state and federal constitutions. AELE has previously appeared as amicus curiae more than 60 times in this Court.

The International Association of Chiefs of Police, Inc. ("IACP"), is the largest organization of police executives and line officers in the world, consisting of more than 12,600 members in 62 nations. Through its programs of training, publication, legislative reform, and amicus curiae advocacy, IACP seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

SUMMARY OF ARGUMENT

Amici curiae anticipate that the Commonwealth of Virginia, which is represented by capable and diligent counsel, will thoroughly brief arguments centering upon the case law. Amici curiae wish to avoid unnecessary duplication of Virginia's arguments, although we agree with those arguments and wish to express support for them. Therefore, this brief instead concentrates upon issues of public policy. Further, although amici agree with Virginia's arguments regarding Respondent Carrier's failure to exhaust state remedies, this brief is confined to the other issue, concerning "cause" for setting aside state procedural rules.

The court of appeals' approach not only conflicts with the prior decisions of this Court, but would interfere with the effective discharge of the duties of the federal courts, to the disadvantage of diligent attorneys, of the citizenry, and of habeas corpus petitioners. Specifically, the court of appeals' approach would force diligent counsel to forego his own judgments concerning the withholding of objections upon marginal issues, solely to prevent the possibility that later judgments by others may result in the labeling of his conduct in ambiguous matters as a "lapse" or an "error." The result would be to emphasize the presentation of lesser claims that, in context and at the time of trial, are not highly significant to determination of guilt or innocence. As a collateral consequence, the lower court's reasoning would obliterate the distinction between competent and incompetent counsel, unfairly stigmatizing diligent attorneys.

At the same time, the court of appeals' approach would make federal habeas decisions depend upon factual questions of the most indeterminate kind, concerning attorneys' states of mind. It would encourage abuse of the writ, contributing to the burden of less meritorious cases that makes difficult the federal courts' task of identifying truly meritorious habeas claims.

ARGUMENT

A SINGLE INSTANCE IN WHICH A FULLY EFFECTIVE AND COMPETENT ATTORNEY WITHHOLDS AN OBJECTION OR ARGUMENT SHOULD NOT FURNISH "CAUSE" TO SET ASIDE STATE PROCEDURAL RULES ON GROUNDS NOT AMOUNTING TO INEFFECTIVENESS OF COUNSEL.

The court of appeals, below, characterized the defense attorney's withholding of an issue he had fully preserved for appeal in the state system as probably involving a "momentary lapse by counsel." [1] Amici respectfully submit, instead, that the

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1 Carrier v. Hutto, 724 F.2d 396, 402 (1983). Although the court remanded for an evidentiary hearing, it persisted in the asserted

attorney's decision[2] not to detract from his brief with the extremely marginal[3] claim at issue was not a lapse (not even a momentary one), but rather was effective appellate briefing

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belief that "the likelihood of attorney error appears very great." Id. at 402. (Amici respectfully disagree for reasons set forth infra in notes 3-4.)

2 Counsel actually specified the issue in the state appellate court in his allegations of error. If he had failed to object or specify the issue, inadvertence might be a possibility. A mistake is exceedingly unlikely, however, when counsel has not only objected, but has actually specified the error to the appellate court. Thus amici submit that the probability of deliberate, tactical choice is overwhelming, contrary to the court of appeals' opinion. That choice was wise, for reasons set forth infra in notes 3-4.

3 As the dissenting judge said in the court of appeals, "It is highly unlikely that a valid Brady claim can be drawn from this case." 724 F.2d at 404.

The Brady line of cases requires disclosure of evidence that is "favorable" or "exculpatory." E.g., United States v. Agurs, 427 U.S. 97 (1976); Brady v. Maryland, 373 U.S. 83 (1963). See also United States v. Bageley, 53 U.S.L.W. 5084, 5086-88 (U.S.S.Ct. July 2, 1985) (citing Brady requirements of "favorable" and "material" evidence; defining materiality as existing "only if there is a reasonable probability that . . . the result of the trial would have been different"). Respondent Carrier's claim, however, is that disclosure should be required under Brady whenever the information is merely "material" to guilt, even if it is not favorable or exculpatory at all. This argument is the claim Carrier now seeks to press. 724 F.2d 396, 399 (1983) (citing Carrier's argument); Respondent's Memorandum in Opposition to Petition for Certiorari at 2 (unprinted version). It is readily apparent that an experienced appellate lawyer would not have asserted this argument if he had any other arguments with any merit at all.

It is surprising that Carrier has argued "boldly," in the words of the dissenting judge, ". . . that he lost a 'sure thing' reversal." Id. at 405. He "lost" no such thing. Instead, again in the words of the dissenting judge, this extremely marginal claim was wisely not argued because "counsel undoubtedly recognized it as a weak issue." Id.

guided by the sound judgment of an experienced advocate.[4] Competent counsel would not file a brief with numerous less persuasive issues that might interfere with consideration of more persuasive ones. Instead, skillful counsel would do as counsel here did: He would select, from among those issues preserved for appeal, those few arguments that he considered most persuasive.[5]

Nevertheless, for purposes of this argument, amici will argue the issue as framed by the court of appeals. We assume, although convinced it is not this case, a case in which counsel has engaged in a "momentary" lapse through "inadvertence," and has therefore not objected to or briefed one among many issues, although counsel has rendered effective representation overall that has fully satisfied the sixth amendment.[6]

For the reasons that follow, amici submit that the existence of a momentary lapse by effective counsel should not result in the setting aside of state procedural rules. Specifically, the court

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4 Even Carrier here speculates that trial counsel's decision was a "willful abandonment" of what he persists, against all indications, in calling "the winning argument." Memorandum in Opposition at 4 (unprinted version, unnumbered note). The dissenting judge correctly describes trial counsel's decision as "both tactical and wise, as counsel undoubtedly recognized it as a weak issue." 724 F.2d at 405.

Indeed, the extreme unpersuasiveness of the claim which Carrier now so pathetically argues was his one "winning" argument, is itself an indication that the decision was tactical. See supra note 3.

5 See infra notes 7-8 and accompanying text; cf. Engle v. Isaac, 456 U.S. 107, 133-34 (1982) (discussing myriad of issues at trial and holding counsel effective even though he overlooks or omits arguments).

6 The court of appeals said, in fact, that in this case, "Carrier's trial lawyer appears to have performed with diligence and skill," except for his "unexplained failure to appeal the Brady issue." That failure is not "unexplained," but is instead clearly traceable to trial counsel's sound judgment that the Brady argument was meritless. See supra notes 3-4.